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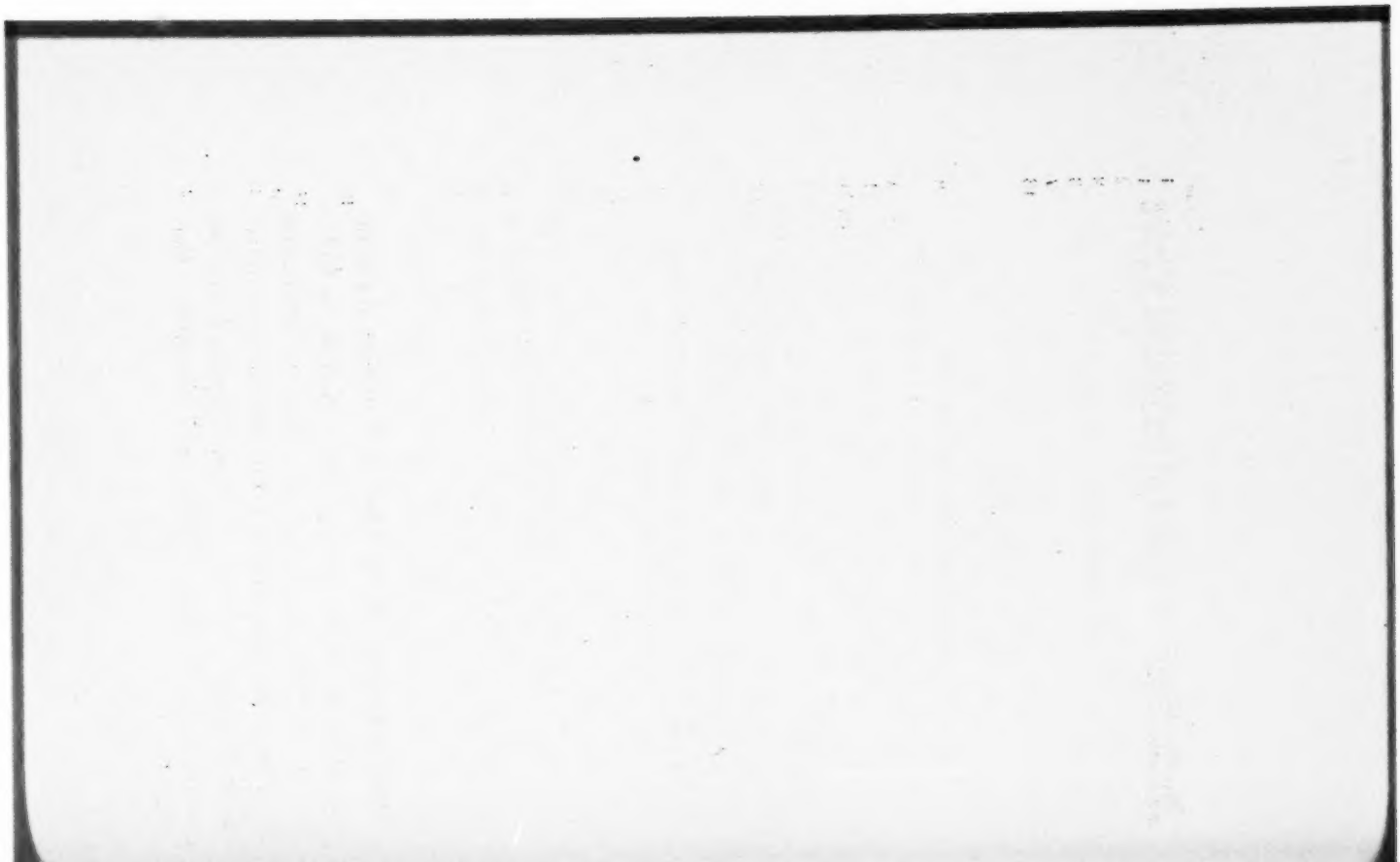

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 890

JOHN MEMOLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the Circuit Court of Appeals for the Third Circuit (R. 848a–849a) is reported at 152 F. 2d 759. The District Court rendered no opinion.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 22, 1946. (R. 849.) Petition for writ of certiorari was filed on February 26, 1946. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See

also Rule XI of the Criminal Appeals Code, promulgated by this Court on May 7, 1934.

QUESTIONS PRESENTED

1. Is the defendant in a criminal action deprived of constitutional rights where the trial judge on his own motion removes certain persons from the jury panel prior to selection of the jury where no prejudice is shown by the defendant?

2. Did the trial judge so conduct himself in the presence of the jury as to prejudice the defendant?

3. Where prior to taking the stand a witness has referred to a document for the purpose of refreshing his recollection but has not utilized the document while testifying, is it error for the court to refuse opposing counsel's request to have the document produced and examined by him?

STATUTES INVOLVED

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 145. PENALTIES.

* * * * *

(b) Any person * * * who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

Section 145 (b) of the Internal Revenue Code is identical.

STATEMENT

The indictment in this case is in two counts, the first charging petitioner with wilfully attempting to evade and defeat payment of a substantial part of his individual income tax for the calendar year 1938, in violation of Section 145 (b), Revenue Act of 1938, and the second count charging him with attempting to defeat and evade a large part of his individual income tax for the calendar year 1939, in violation of Section 145 (b), Internal Revenue Code. (R. 6a–13a). Petitioner was found guilty by a jury on both counts and sentenced to imprisonment of eighteen months and a fine of $1,000 on each count, the sentences to run consecutively and not concurrently. (R. 4a.)

Petitioner was a practicing lawyer in Scranton, Pennsylvania for approximately thirty-six years. (R. 506a.) The evidence showed that in 1938 he had received gross income from his profession in the amount of $162,026.01, whereas he had reported for income tax purposes gross fees of only $42,357.60. The evidence also showed that in 1939 he had received gross income from his profession in the amount of $77,669.73, whereas he had reported gross income from his profession of only $20,264.63. This evidence consisted of testi-

mony of the witness Snyder (R. 88a–91a) that fees totaling $41,000 in 1938 and $40,084.99 in 1939 were paid to petitioner by Bethlehem Steel Company as legal fees in connection with the acquisition of the Williamsport Wire Rope Company by the Bethlehem Company and the admission of the petitioner that he received such amounts (R. 520a, 569a); the testimony of the revenue agent that according to petitioner's records he received fees from other clients totaling $16,532.22 in 1938 (R. 412a) and $14,592.16 in 1939 (R. 422a); the testimony of the witness Maloney (R. 211a–212a) and the witness Fear (R. 279a–280a) that petitioner received $25,903.79 of a check issued by Bethlehem Steel Company payable to E. J. Maloney & Company purportedly for accounting services rendered by Maloney; testimony of Snyder (R. 92a, 95a) that checks in the amounts of $25,000 and $34,990 were issued in 1938 to Martin Memolo, petitioner's brother, and the petitioner's admission that he received proceeds of such checks and had the same in his safe deposit box (R. 181a, 183a); testimony of the revenue agent that petitioner deposited in his bank accounts, apart from the fees from his various clients and proceeds of Bethlehem checks payable to him, cash in the amount of $4,600 in 1938 (R. 417a) and $22,992.58 in 1939 (R. 428a); and the admission of petitioner upon cross-exami-

nation that out of a check of approximately $30,000 paid by Bethlehem Steel Company to his office associate, John Crolly, a special master in the Williamsport receivership proceeding (R. 510a), he received $14,000 to $17,000 (R. 554a, 557a), and that he had "probably" told a grand jury that he had received all of the $30,000 (R. 558a–559a).

Two Bethlehem checks payable to the petitioner in the amounts of $36,000 and $40,084.99 and a Bethlehem check in the amount of $34,990 payable to Martin Memolo were deposited in an account in the Chase National Bank of New York City which was opened on December 17, 1938, by petitioner. (R. 115a, 118a, 122a.) On August 8, 1939, petitioner withdrew $110,000 (R. 123a–124a, 127a–128a) and had the money delivered to him in one thousand dollar bills at his office at Scranton (R. 145a–146a).

A Bethlehem check for $25,000 dated July 15, 1938, payable to Martin Memolo, was deposited in the Fidelity Deposit & Discount Bank of Dunmore in an account opened in the name of Martin Memolo on July 22, 1938, and cash in that exact amount was withdrawn the same day. (R. 265a.) The Bethlehem check was endorsed in the handwriting of petitioner's son (R. 589a), who actually cashed the check at the bank (R. 517a). Peti-

tioner admitted receiving this money (R. 517a) but contended that he held these funds, as well as the $34,900 deposited in the Chase National Bank, for his brother and repaid him at various times, the final payment being $20,000 in 1942 (R. 519a). On cross-examination he admitted that he maintained in his books of account a ledger sheet showing total loans to his brother for $1,449.35, commencing with a loan of $300 on August 18, 1938, and ending with a charge of $200 on February 12, 1943, and showing the only credit to the account a payment of $200 by his brother's widow on May 18, 1944. (R. 566a.) His brother's estate was appraised at $209.36 net (R. 694a), and petitioner admitted that he had filed a claim against the estate for the net amount shown due from his brother on his records (R. 567a).

With regard to the $25,903.79 received by petitioner from the $31,075 payment made by Bethlehem Steel Company to Maloney, Maloney testified that he conducted an audit for approximately one week in Williamsport of the Williamsport Wire Rope Company (R. 196a, 197a), that petitioner told him to make out a bill for $31,075 (R. 197a, 551a). Maloney actually received a fee from petitioner of $1,200 for his work but was instructed by petitioner to return the entire $31,075 on his (Maloney's) income tax return, which he did, and petitioner paid Maloney the further sum of $3,971.21 to take care of Maloney's taxes. (R. 203a–205a, 511a–512a.)

When questioned by the revenue agent and the special agent concerning the latter payment to Maloney, he told them that it might have been an "accommodation" or a "wash transaction." (R. 591a–595a.) In his own records, petitioner had expunged the name of the person to whom the $3,971.21 had been paid.

When the revenue agent first commenced his investigation in October 1939, he asked for substantiation of the gross fees of $42,357.60 reported in the return. Petitioner gave him an adding-machine tape showing a substantially similar total and containing items of $5,000 and $25,000. When questioned, petitioner refused to reveal the nature or source of the items. (R. 395a–399a.) Petitioner refused to produce any records with reference to the receipt and disbursement of fees from Bethlehem. (R. 354a–355a.)

ARGUMENT

1. Petitioner complains that his rights under the Fifth and Sixth Amendments to the Constitution of the United States were invaded by the trial judge in excusing a number of jurors at the outset of the trial and before selection of the trial panel. He states that these jurors were "regarded as favorable to the defense." (Br. 20.)

Although petitioner objected to the excusing of the jurors, saved an exception (R. 29a) and preserved the point in his assignment of errors

(R. 739a–742a), he abandoned the point in the Circuit Court of Appeals by failing to urge it. This Court will not ordinarily consider matters not raised in the court below. *Chicago, St. P., M. & O. Ry. Co.* v. *United States,* 322 U. S. 1; *Sonzinsky* v. *United States,* 300 U. S. 506; *Pacific States Co.* v. *White,* 296 U. S. 176; *White River Co.* v. *Arkansas,* 279 U. S. 692; *Blair* v. *Oesterlein Co.,* 275 U. S. 220.

Petitioner does not claim that the elimination of the jurors in question resulted in any failure to obtain a fair and impartial jury. As stated by this Court in *Hayes* v. *Missouri,* 120 U. S. 68, 71:

> The accused cannot complain if he is still tried by an impartial jury. He can demand nothing more. *Northern Pacific Railroad* v. *Herbert,* 116 U. S. 642. The right to challenge is the right to reject, not to select a juror.

Cf. *Hopt.* v. *Utah,* 120 U. S. 430; *Spies* v. *Illinois,* 123 U. S. 131, 168; *Holt* v. *United States,* 218 U. S. 245, 248.

The exclusion of jurors from the jury panel is within the discretion of the court. The exercise of such discretion will not be disturbed unless there has been an abuse of discretion. *Tex. & Pac. Ry.* v. *Hill,* 237 U. S. 208; *Lias* v. *United States,* 51 F. 2d 215 (C. C. A. 4th), affirmed, 284 U. S. 584.

In the instant case, the trial judge was obviously acting in the exercise of his sound discretion. In commenting upon the reasons for excus-

ing the jurors in question, the trial judge stated (R. 26a–27a):

> * * * Some of them on their own application, some because of obvious physical disability. Some have heart trouble and a woman here has had a stroke. One man here is suffering because of impaired hearing and the like. I don't think any of those people would make competent jurors in a case that may last several days. * * * the right to excuse jurors is within the discretion of the Court. The right of the defendant is to exclude jurors, not the right to select them. This is in the discretion of the Court, because on the information I have it is my judgment that these jurors because of matters that have come to my attention would not be competent jurors. Now, I don't intend to put forth in this record those reasons, because it has nothing to do with this case. * * * There is one juror I have excused, who is past beyond the age that I would consider a person for jury duty.

Whatever the source of the judge's information, whether by personal observation or as a result of investigation undertaken by either the prosecution or the defense and conveyed to the judge, there is no showing that there was an abuse of discretion in excluding the jurors in question. Petitioner's suggestion (Br. 24) that jurors were excluded because they might be favorable to the petitioner is wholly speculative. The affidavits

submitted by petitioner show that in one instance, the exclusion was on the ground that the juror "is apt to be prosecution-minded" (Pet. 14) and that a lawyer was excluded because he would be "naturally inclined to uphold the law" (Pet. 15).

2. Petitioner asserts that he was prejudiced by the conduct of the trial judge by his "abuse and ridicule * * * upon Petitioner's case and his attorney" (Br. 26) and by interruption of direct (Br. 40) and cross-examination (Br. 28). He cites some thirty-four instances in support of his claim. (Br. 26–57.)

A seriatim reading of these passages, removed as they are from their context, might well give a distorted and wholly inaccurate view of the trial. Cf. *United States* v. *Warren,* 120 F. 2d 211, 212 (C. C. A. 2d).

Close examination of the matters complained of by petitioner disclose that many of them involve the orderly procedure of the trial and proper efforts of the trial judge to confine the testimony to the real issues. The others involve the exercise of the trial judge's well established prerogative to question witnesses and to comment on the evidence. *Glasser* v. *United States,* 315 U. S. 60; *Horning* v. *District of Columbia,* 254 U. S. 135; *Simon* v. *United States,* 123 F. 2d 80 (C. C. A. 4th), certiorari denied, 314 U. S. 694; *Moore* v. *United States,* 132 F. 2d 47 (C. C. A. 5th), certiorari denied, 318 U. S. 784; *Pfaff* v. *United*

States, 85 F. 2d 309 (C. C. A. 7th); *Fryer* v. *United States,* 11 F. 2d 707 (C. C. A. 7th).

If at times the trial court spoke emphatically to counsel for petitioner, such emphasis appears to have been necessary. Cf. *United States* v. *Lee,* 107 F. 2d 522, 529 (C. C. A. 7th), certiorari denied, 309 U. S. 659. See, for example, R. 683a–685a, where counsel for petitioner persisted in asking an improper question after the court's ruling.

The evidence of petitioner's guilt was overwhelming. Nor does petitioner now contend that the evidence was insufficient to warrant his conviction. As stated in *Pfaff* v. *United States, supra* (p. 312):

> It was not the comment of the court that was prejudicial. * * * The deductions of any jury were more damaging than the observations of the court. * * *

In his charge to the jury the trial judge refrained from commenting on the evidence, and instructed the jury that it was not to be influenced by comments of the court during the trial, but that such comments should be disregarded. (R. 717a.) In view of such instruction, and the abundant evidence of petitioner's guilt, it cannot be said that the incidents complained of affected the outcome of the trial or deprived petitioner of a fair trial. *Glasser* v. *United States, supra; United States* v. *Lee, supra; Meyer* v. *United*

States, 67 F. 2d 223 (C. C. A. 9th); *United States* v. *Domres,* 142 F. 2d 477 (C. C. A. 7th), certiorari denied, 323 U. S. 723.

3. Petitioner claims the trial court erred in refusing to permit examination of notes taken by a witness during interview of the petitioner. The notes, however, were not used by the witness while on the stand (R. 361a–362a), and it was therefore proper to reject petitioner's request to see them. *United States* v. *Goldman,* 118 F. 2d 310, 314–315 (C. C. A. 2d), certiorari denied, 313 U. S. 588; *Little* v. *United States,* 93 F. 2d 401 (C. C. A. 8th), certiorari denied, 303 U. S. 644.

Petitioner asserts (Br. 60) that it was important that he see the notes in question to support his contention that he had repeatedly asked the revenue agent to inform him the extent of his tax liability. However, there was no issue as to this point as the agent testified that petitioner had made such inquiries on a number of occasions. (R. 383a–384a.) Thus, he was in no way prejudiced by the court's refusal to cause the production of the notes.

Nor is the decision below in conflict with *Morris* v. *United States,* 149 Fed. 123 (C. C. A. 5), as alleged by petitioner. (Pet. 8.) In that case the document used to refresh the witness' recollection was handed to the witness and used by him while he was on the stand.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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